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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 411

THE GALVESTON WHARF COMPANY ET AL., *Petitioners,*

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., *Respondents.*

BRIEF FOR RESPONDENT GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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McCURDY-YOUNG CO., HOUSTON

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Opinions of Courts Below.

The opinion of the Texas Court of Civil Appeals is not officially reported but may be found in 13 S. W. (2nd) 983. The opinion of the Texas Commission of Appeals is not officially reported but may be found in 25 S. W. (2nd) 588. The opinion of the Supreme Court of Texas has not yet been officially reported but appears in 36 S. W. (2nd) 985.

Jurisdiction.

No question as to the jurisdiction of this court is made by this respondent.

Statement of the Case.

While the statement contained in the brief of petitioners is accurate in most respects, this respondent feels that certain inadvertent omissions therein render a somewhat fuller statement desirable. Our statement will be confined to matters occurring after the arrival of the goods at Galveston.

The petitioner Galveston Wharf Company owns approximately fifty-one miles of railroad in the City of Galveston, and is the only railroad serving the waterfront. None of the trunk lines serving Galveston have any rail connection with the waterfront except by the tracks of the Galveston Wharf Company. The Wharf Company owns a number of wharves and piers on the waterfront, one of which is leased to the respondent Mallory Steamship Company for its exclusive use (R. 57), and is commonly known as the "Mallory Docks" (R. 46). This is the sole freight depot of the Mallory Steamship Company in Galveston (R. 64), and was the wharf destroyed by the fire out of which this action arose. Inbound through shipments via the Mallory line destined for inland points were customarily handled over the Mallory Docks in the following manner: Less than carload shipments were unloaded from the vessel and placed upon the wharf in portions thereof reserved for the various rail lines (R. Ex. 80L). Carload shipments when taken from the vessel were not placed in any designated portion of the wharf, but were placed at the most convenient point to the place they happened to be stowed in the particular vessel (R. 43). (The shipment here involved was a carload shipment.) After the goods had been placed on the wharf a representative of the rail lines in company with a representa-

tive of the Mallory would check each shipment for broken packages. This check was for the sole purpose of determining what packages needed re-coopering, a duty undertaken by the Mallory, and the only check at this time taken as to the number or amount was with reference to the contents of the broken packages, and not as to the shipment as a whole. When the Mallory completed re-coopering a package it was again inspected by the representatives of the rail lines and the Mallory, and if found in shipping condition would be marked "O. K." by the representative of the rail lines (R. 53). Representatives of the Wharf Company would take shipments from the floor of the wharf in due course, giving preference to less than carload freight and perishable freight, and truck them into the cars of the respective rail lines standing within and alongside the wharf. When the goods were lifted from the floor by employees of the Wharf Company to be trucked into the cars, a joint check as to number or amount would for the first time be made. This check would be made by a representative of the Mallory and a representative of the Wharf Company, either as the goods were trucked into the cars or within the cars if the nature of the commodity permitted it (R. 58, 63-4). A receipt would be thereafter issued to the Mallory for the goods, which receipt was usually not actually delivered until some days later, but invariably bore the date the goods were actually checked and loaded into the cars and not the date the goods were unloaded from the ship (R. 55).

The Wharf Company, under its tariff, charged and received payment for three distinct services with reference to goods moving in the above manner: (1) a

wharfage charge based on weight and commodity paid by the Mallory Steamship Company in addition to the rental reserved under the lease contract, (2) a loading charge, paid by the rail line involved, for lifting the goods from the wharf and loading them into the cars, which charge was likewise based on weight and commodity, and (3) a switching charge of $4.05 for each car moved from the wharf to junction with the trunk line carrier (R. 57-58, 59-60; Ex. 86U).

Under these facts and the facts recited in the brief of petitioners the points urged by this respondent are:

(1) That under the undisputed facts there was no delivery of the goods from the Mallory Steamship Company to the Galveston Wharf Company.

(2) That even if a delivery had been made to the Galveston Wharf Company, that company held the goods as a common carrier and not as an agent of this respondent, and

(3) That the limitation of liability contained in the tariff of petitioner Galveston Wharf Company is by its very terms inapplicable under the facts of this case.

ARGUMENT

Point 1.

This respondent adopts the argument of petitioner in support of the proposition that as a matter of law there had been no delivery of the goods from the Mallory to the Wharf Company at the time of the fire. We would, however, call the court's attention to the fact that the undisputed facts enumerated by the Supreme Court of Texas as showing that there had been no delivery to the railroad are equally cogent in showing affirmatively that there had been no delivery to the

Wharf Company (R. 152-155). It is submitted that no fact issue was raised by the conclusions of witnesses that there "was nothing else to be done" by the Mallory or that the witness "considered" delivery had been made (R. 55). Certainly such conclusions may not raise a fact issue against positive and uncontroverted evidence that something more was done, to wit, that the goods were policed by employees of the Mallory Steamship Company (R. 51), and that the Mallory undertook the salvage of the goods after the fire (R. 76), and reserved the right to divert the shipment from one railroad to another at any time prior to the actual loading into the cars (R. 47). It is difficult to understand how the Mallory Steamship Company could exercise the control it actually exercised over the goods and undertake their protection and yet deny that the goods were in their possession.

The decisions of the courts below likewise overlook one further important consideration. It is well settled that for delivery by a carrier to be completed the party to whom delivery is to be made must be given seasonable notice and a reasonable time in which to remove the goods from the premises of the carrier after the goods are in condition for delivery. *Richardson v. Godard*, 23 How. 28; *The Mary Washington*, 1 Abb. 1, Chase, 125, Fed. Cas. No. 9229; *Unnevehr v. The Steamship Hindoo*, 1 Fed. 627; *Turner v. Huff*, 46 Arkansas 222; *Hill Manufacturing Company v. Boston, etc., R. Corp.*, 104 Mass. 122; *McAndrew v. Whitlock*, 52 N. Y. 40. Here the goods were not ready for delivery until approximately 4 p. m. of the day of the fire because of re-coopering done by the Mallory Steamship Company (R. 49). The usual and customary time for loading op-

erations to cease was 7 p. m. because cars loaded after that hour could not be placed in the evening trains of the trunk lines (R. 61). Under these facts it is respectfully submitted that a reasonable time for taking possession of the goods had not elapsed when the goods were destroyed, which is simply an additional reason to those above enumerated showing, as a matter of law, that possession of the goods remained with the Mallory until their destruction.

Point 2.

Petitioner Galveston Wharf Company concedes, as it must, that it is a common carrier but insists that if it was in possession of the goods at the time of their destruction it was not in such capacity but only as the agent of this respondent. Assuming such agency it is not perceived how it could affect petitioner's liability to plaintiff. Under the Carmack Amendment each connecting carrier is made the agent of the originating carrier, *Missouri-Kansas-Texas Railway Company v. Ward*, 244 U. S. 383, 388, yet such agency has never been suggested as a reason for denying recovery to a shipper against one of the connecting carriers in possession of the shipper's goods when they are destroyed.

It is true that petitioner was not named in the bill of lading and did not participate in the through rate but received only a fixed charge for its services. No case has been found, however, to indicate even the necessity of a bill of lading, much less mention therein, for a carrier in possession of goods to be liable for their destruction. All the decisions are to the contrary, *United States v. St. Joseph's Stockyards Company*, 181

Fed. 625 (reversed on different grounds, 186 Fed. 104); *Texas & Pacific Railway v. Henson*, 103 Texas 598; *Kansas City Southern Railway v. Rosebrook-Josey Grain Company*, 114 S. W. 436 (Tex. Civ. App.); *Joest v. Clarendon & Rosedale Packet Company*, 122 Ark. 353; *State v. Jacksonville Terminal Company*, 90 Florida 721; *Batchelder & Snyder & Company v. Union Freight Railroad Company*, 259 Mass. 368; *Fleming v. Kansas City Suburban Belt Ry.*, 80 Mo. App. 129; *Sesser v. Chicago I. & M. Ry.*, 267 Ill. 418; *Missouri Pacific Railway v. Wichita Wholesale Grocery Co.*, 55 Kansas 525; *State v. Union Stockyards Co.*, 81 Neb. 67, and it is expressly provided in Section 20 (11) of the Transportation Act that:

> " * * * any common carrier, railroad, or transportation company delivering said property so received and transported, shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, *whether such receipt or bill of lading has been issued or not*, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading. * * *"

The Massachusetts Supreme Judicial Court held in *Batchelder & Snyder & Company v. Union Freight Railroad Company, supra*, that a switching carrier was liable to the shipper for goods injured while in its possession even though it was not mentioned in the bill of lading and did not participate in the through rate. A similar holding, under similar facts, was made by the

Supreme Court of Kansas in *Missouri Pacific Railway v. Wichita Wholesale Grocery Co., supra,* and it was also expressly held that the fact that the switching charge was paid by another carrier did not affect its liability to the owner of the goods.

In considering this question, the physical situation at Galveston must be borne in mind. The Wharf Company is the sole rail connection between the waterfront and the termini of the rail lines entering Galveston. Goods coming over the Mallory docks are carried some two and one-half miles by the Wharf Company to the rail connections. The Wharf Company's lines are the only means of rail connection on rail-water movement through the Port of Galveston. This very situation has been recognized by the Legislature of the State of Texas, since, in Article 1491, Revised Civil Statutes of Texas, 1925, it is provided:

> "Any railroad, or other means of transportation, which may be constructed between the mainland and any deep water harbor or channel shall be a public highway. All rates and charges for the transportation of freights and passengers thereon shall be subject to the control and regulation of the Railroad Commission as a railroad. Such railroad or other means of transportation shall receive from each ship, boat and vessel, or from the wharf on which the same is discharged, all freights and passengers, and transport and deliver them to the consignee, or any connecting line of railroad, without discrimination as to charges or delay in transportation and delivery, and shall in like manner receive from every person and from every connecting line of railroad, all freight and passengers, and transport and deliver the same to each and every ship, boat, vessel, person or corporation for delivery to such ship, boat or vessel on like equal and

just terms, without discrimination as to charges and delay in tranportation or delivery thereof."

Even though the shipment here involved is interstate, this statute is relevant as showing the *character* of the Wharf Company, it being situated entirely within the State of Texas. Under its provisions the Wharf Company is plainly made a common carrier, not only as to plaintiff, but as to this respondent. By its terms the Wharf Company, in operating the link between the rail and water carriers in rail-water shipments, is bound to serve the rail and water carriers in this connection as a common carrier. There is nothing new or novel in one common carrier occupying the relation of common carrier to another. That such relation could exist was early held by the Supreme Court of Illinois, in *Peoria & Pekin Union R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill. 135 (1884), and nothing to the contrary has since appeared. To hold in this case that the Wharf Company was merely the agent of this respondent and that the latter alone is responsible to plaintiff, would mean that a railroad would be held liable, finally and completely, for the destruction of a shipment it had never even seen or had an opportunity of inspecting as to weight and number. It would also mean that the Wharf Company could enjoy all the privileges and immunities of a common carrier, including the unusual one of absolute freedom from competition, without suffering any of the liabilities to which other common carriers are subject. In no case where it handled goods in transit would it ever be liable, if not here, for its contention when analyzed means that in such handling it is always acting as agent of some other carrier, and never on its own responsibility.

Petitioner seeks support for its position in the case of *Missouri Pacific Railway Company v. Reynolds-Davis Grocery Company*, 268 U. S. 366, involving the shipment of a carload of sugar from Raceland, Louisiana, to Fort Smith, Arkansas. The bill of lading and the through rate covered delivery to the warehouse of the consignee in Fort Smith, a point not reached by the lines of the Missouri Pacific, named in the bill of lading as the delivering carrier. The St. Louis & San Francisco served the warehouse of consignee, and it was employed by the Missouri Pacific to do the necessary switching for delivery. The goods were destroyed while in the possession of the St. Louis & San Francisco, and the consignee filed suit to recover the loss against the Missouri Pacific as the delivering carrier under the bill of lading. The Missouri Pacific sought to avoid liability to plaintiff on the ground that it had performed its duty under the bill of lading by delivery to the next connecting carrier, and was, therefore, not liable. Under these circumstances, it was properly held that the Missouri Pacific, having contracted to deliver the goods to the warehouse of consignee, could not escape liability under the contract by delegating its obligation to another, and so far as the owner of the goods was concerned, the St. Louis & San Francisco was merely the agent of the defendant Missouri Pacific. It was neither held nor suggested that plaintiff could not have recovered against the St. Louis & San Francisco had the plaintiff elected to sue it, and the case is therefore not at all in point here. The owner of the goods in the present case might have proceeded against the originating carrier under the Transportation Act, and have recovered without the necessity of showing in

whose possession the goods were at the time of their destruction. [The transactions involved in this case took place before the Amendment of 1927 placed liability on the delivering carrier also, Section 20, (11), 44 Statutes at Large, 1669.] Instead, the owner elected to file suit against three carriers, including the Wharf Company, alleging that one was in possession of the goods at the time of their destruction, and seeking recovery against the carrier in possession. The Supreme Court of Texas found that the goods were in the possession of the Wharf Company as a common carrier, and the owner of the goods having sought recovery against that company, the judgment of the trial court against it was correct. If possession was properly placed below it is respectfully submitted the judgment rendered is correct and should be affirmed.

In passing it may be remarked that if the Wharf Company was acting as agent of anyone with reference to the goods when they were destroyed it was as agent of the Mallory Steamship Company. The goods at the time of the fire were on a movement for which a tariff charge was paid by the Mallory Steamship Company—that of wharfage (R. 59-60). It is undisputed that the Wharf Company had not at such time taken any action with reference to the goods for which a charge would have been made against this respondent and none was ever assessed or paid (R. 62). The obligation of the Mallory under the bill of lading was to deliver the shipment to "another carrier on the route" and there was none on this respondent to come and get the shipment (R. Ex. 80A). The movement across the wharf was a part of the movement toward delivery to "another carrier" and if payment for service makes

agency then the agency was between the Mallory Steamship Company and The Galveston Wharf Company, since the goods at the time were on a movement for which the Mallory paid the Wharf Company.

Point 3.

Petitioner Galveston Wharf Company relies upon the following provision in its tariff as relieving it of liability here:

> "Under the rates named in Items Nos. 40, 42, 48 and 50, the Railroad Company from which freight is received, or to which freight is delivered, shall be liable for all loss or damage occurring to freight on lines of this Company, other than through the negligence of this Company, and this Company will not be liable for any injury to cars while in its possession, except through its own negligence" (R. Ex. 86D, Item 6C).

We do not understand counsel for the Wharf Company to contend that this provision binds the plaintiff below, but if such contention is made the answer is plain—(1) the provision does not purport to bind plaintiff, and (2) a carrier having notice that goods are moving on a through bill of lading cannot alter the terms of the contract by attempting to impose new and additional provisions for the movement on its lines. *Kobb v. Brown,* 193 Fed. 958.

In so far as this respondent is concerned the provision is by its very terms inapplicable. It applies only "under the rates named in Items Nos. 40, 42, 48 and 50." These items fix rates for switching loaded cars from various points to others (R. Ex. 86U). Before these goods would have reached the stage where the ser-

vice covered by Items Nos. 40, 42, 48 and 50 would apply another service provided in the tariff would have to be performed—the loading from the wharf into the cars (R. Ex. 86V, W and X). Thus, at the time of the fire the goods, if in the possession of the Wharf Company, were not in its possession "under the rates named in Items Nos. 40, 42, 48 and 50" but were in its possession under the rates named in Item No. 144 (R. Ex. 86V). Furthermore, the uncontroverted testimony of the General Manager of the Galveston Wharf Company is that petitioner "had not begun to start the service they were going to be paid for by the G. H. & S. A" (R. 62). Thus the petitioner's argument that when a service is performed under the tariff the tariff becomes the contract between the parties is of no avail since such service was not performed nor begun to be performed at the time of the fire.

In addition to the foregoing the limitation is expressly confined to "loss or damage ocurring to freight *on the lines of*" the Wharf Company. These goods were destroyed on the wharf of the Mallory Steamship Company.

We do not find it necessary here to invoke the familiar rule that limitations of liability contained in contracts with carriers are to be strictly construed.

Conclusion.

To hold this respondent liable for the destruction of the shipment involved in this case at a time when their protection had been undertaken by the Mallory Steamship Company and before this respondent had ever had an opportunity to check them, would result in a manifest injustice, and this petitioner prays that the

judgment below, in so far as it relieved this respondent of liability, be affirmed.

Respectfully submitted,

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